DPCC Special Report:

Eight Isn't Enough – How a Shorthanded Supreme Court Couldn't Decide Key Cases

The end of the recent Supreme Court term demonstrates that a fully functional Court requires nine justices. With only eight justices, the Court failed to reach a final decision on critical issues that impact all Americans in several instances, creating uncertainty in our legal system and often giving Americans in different parts of the country different rights and responsibilities. It is clear that we need a Supreme Court operating at full strength so that Americans across the country receive definitive justice that provides them with clarity and certainty.

President Obama nominated Judge Merrick Garland more than 100 days ago to fill the vacancy on the Supreme Court, but Senate Republicans refuse to do their jobs and provide timely consideration of his nomination. Unfortunately, Republicans continue to put politics first by listening to the most extreme, right wing voices and leaving a vacancy on the Supreme Court unfilled. It's time for Senate Republicans to put the Constitution above politics and do their job by holding a hearing and a vote on Judge Garland's nomination to the Supreme Court.

The following report highlights seven instances in which unprecedented Republican obstruction has weakened the Court and delayed or denied justice for Americans across the country.

1. A Deadlock on the President's Immigration Policies

The Issue: Will the President's steps to address our broken immigration system provide relief for law-abiding immigrants who reside in the country illegally?

The Background: On November 20, 2014, the President announced that the Department of Homeland Security would issue a series of immigration directives that strengthen border security, prioritize enforcement resources, and ensure accountability in our immigration system. On December 3, 2014, the Texas Attorney General joined by 21 states, one Attorney General, and three Governors brought suit in the U.S. District Court for the Southern District of Texas, Brownville Division, to challenge the legality of two of those immigration directives and to halt their implementation. These States subsequently requested the temporary suspension of the implementation of those immigration directives until a court decided whether they are lawful. A

federal district court granted that request, and in doing so, issued a nation-wide injunction. The Fifth Circuit Court of Appeals affirmed.

The Supreme Court took the *United States v. Texas* case to resolve whether a state that voluntarily provides a subsidy to all unauthorized immigrants with deferred action has a legal right to challenge federal immigration guidance that would result in more immigrants having deferred action; whether such guidance is unlawful or violates the Constitution; and whether such guidance should have been subject to the notice and comment process.[1]

The Impact of a Shorthanded Court: The Supreme Court splitting 4-4 in the *Texas* case means that the President's important steps to fix our broken immigration system cannot be implemented. As a result of the deadlocked decision from a shorthanded Supreme Court, we will not be able to move forward with the deferred action policies announced by the President in 2014 that would focus enforcement resources on dangerous criminals, grow our economy, and provide certainty to immigrant families across the country. These efforts would have brought as many as 5 million people out of the shadows, and help immigrant families, many of which include U.S. citizen children, live productive lives free of fear.

2. Uncertainty about Women's Access to Reproductive Healthcare

The Issue: Does the requirement that religiously-affiliated employers notify the federal government that they object to providing their employees with contraceptive coverage on religious grounds under the Affordable Care Act (ACA) violate the Religious Freedom Restoration Act (RFRA)?

The Background: The ACA requires health plans provided by employers to cover certain preventive health services, like contraceptives as part of their health plans.[2] In implementing this requirement, the Obama Administration created a "religious accommodation" for non-profit groups with religious objections to birth control in order to exempt these employers from including birth control coverage in their employer-sponsored insurance plans. In order to qualify for the accommodation, employers need only submit a one-page form that notifies the government of their objection. The accommodation exempts employers from paying for the coverage, but also ensures that women still receive birth control coverage directly from insurance companies. Houses of worship are already exempt from the requirement to provide contraception coverage.

In the case before the Court this year, *Zubik v. Burwell*, religiously-affiliated nonprofits that provide their employees with health insurance argued that submitting a notification of their religious objection to their insurer or the Federal Government "substantially burden[ed] the exercise of their religion, in violation of the Religious Freedom Restoration Act."[3] The employers in *Zubik* contend that the "religious accommodation" violates their religious liberty under RFRA, because even notifying the Department of Health and Human Services of their objection, so that an insurance company could provide birth control coverage at no cost to the employer, made them complicit in providing women with birth control, which they view as an abortifacient.[4] The question before the Supreme Court was whether the notification

[1] U.S. Supreme Court, accessed 6/28/16.
[2] Zubik v. Burwell, 5/16/16.
[3] Zubik v. Burwell, 5/16/16.
[4] Zubik v. Burwell, 5/16/16; Petition for a Writ of Certiorari in Zubik v. Burwell, 5/29/15.

requirement violated the religiously-affiliated employers' rights under RFRA. Eight of the nine federal appellate courts that have ruled on this issue sided with the federal government, with the Eighth Circuit being the sole court to rule in favor of the employers. After oral argument, the Supreme Court took the highly unusual step of requesting that the parties submit a supplemental briefing on a question posed by the Court related to a possible compromise on the parties' positions.

The Impact of a Shorthanded Court: Even after receiving the supplemental briefing, the Supreme Court was seemingly unable to avoid deadlocking on the issue. Instead, faced with the possibility of not being able to make a final decision with eight Justices, the Court's eight justices punted the case back down to the lower courts, vacating the prior decisions, and directing the courts to issue new decisions taking account of the new filings the Court had unusually requested from the parties. This decision also allowed the Administration's "religious accommodation" to continue while the cases were sent back to the appellate courts, continuing to ensure women have contraceptive coverage.

The Supreme Court's decision in *Zubik* did not resolve the case and it does not set a legal precedent for the lower courts. In the near term, the Court's action is not expected to impact women employees' access to contraceptive coverage. Nevertheless, because of the Supreme Court's failure to reach a final decision in this matter, many questions remain unresolved, most importantly, whether women employees of religious non-profits nationwide will continue to have health insurance coverage for their contraception.

3. A Deadlock on Public Sector Union Fees

Issue: Do agency shop provisions that require public, non-union employees to pay fees for a union's collective bargaining activities violate those employees' First Amendment rights?[5]

The Background: California law requires public, non-union employees to pay unions for the collective bargaining services that provide benefits to all members, even though they are not union members.[6]

Friedrichs v. California Teachers Association involved California teachers that brought suit alleging that a California law -- requiring public, non-union employees to pay unions for their collective bargaining services even though they are not members of those unions -- violated their First Amendment rights. The unions argued that "the teachers' First Amendment arguments were a ruse … [c]ollective bargaining [was] different from spending on behalf of a candidate, [and] the plaintiffs were seeking to reap the benefits of such bargaining without paying their fair share of the cost."[7] The Ninth Circuit sided with the unions.[8]

The Impact of a Shorthanded Court: The Supreme Court issued a 4-4 split decision in this case which does not set a binding precedent, but has the effect of upholding the lower court's decision in favor of the unions. More than seven million public sector workers currently receive

[5] U.S. Supreme Court, accessed 6/28/16; The New Yorker, 4/1/16.
[6] New York Times, 3/30/16.
[7] New York Times, 3/30/16.
[8] The New Yorker, 4/1/16.

the economic benefits associated with union membership.[9] Until a final determination is made by a fully-functioning Supreme Court, the constitutional issue remains uncertain. Thus, the ability of unions to require that non-union, public-sector employees pay fees for such unions' collective bargaining activities is still subject to further challenge.

4. A Deadlock Creating Confusion over Tribal Justice for Child Abuse Victims

Issue: Whether tribal courts have jurisdiction to adjudicate civil tort claims brought by tribal members against a nonmember corporation that operates a store on a tribal land, when the claims arise from the store manager's alleged assault upon a tribal member, who was working at the store as an intern.[10]

The Background: *Dollar General Corporation v. Mississippi Band of Choctaw Indians* concerns a civil tort claim brought by a youth member of the Mississippi Band of Choctaw Indians. After being assigned to work at a store on tribal land owned by the Dollar General Corporation as part of a tribe-sponsored job training, this youth alleged that he was sexually molested during his work assignment by the store's non-tribal manager. Although "Dollar General had expressly consented to the application of tribal law and tribal court jurisdiction in its lease documents, and it operated pursuant to a business license issued by the tribe, it did not expressly consent to any tribal laws or regulations in agreeing to accept a tribal youth into its store for a work assignment as part of the tribal job training program."[11] After the relevant U.S. Attorney did not bring a case against Dollar General Corporation or the manager at issue, the youth's family sued Dollar General Corporation and that manager in tribal court alleging "negligence in hiring, training, and supervising" the non-tribal manager.[12] A lower tribal court, the Choctaw Supreme Court, a federal district court, and the U.S. Court of Appeals for the Fifth Circuit all found that tribal courts had jurisdiction over the case. Dollar General argued that tribal courts did not have such jurisdiction because of a 1978 Supreme Court case that found that tribal courts don't have jurisdiction over non-tribal members who commit criminal offenses on tribal lands unless they consented to such jurisdiction.[13]

Impact of a Shorthanded Court: The Supreme Court deadlocked 4-4 in the *Dollar General v. Mississippi Band of Choctaw Indians* case. The lower court's decision allowing the matter to be heard by a tribal court stands, although the Supreme Court's decision does not set binding precedent.[14]

The growing rate of sexual assault on tribal lands has proven to be a significant and troubling issue. According to the Department of Justice, "[o]ne in three American Indian women have been raped or have experienced an attempted rape"[15] and the rate of sexual assault among American Indian women is more than double the national average.[16] Also, according to the Department of Justice, "at least 86% of [these] sexual assaults are reportedly being perpetrated

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[9] EPI, 1/8/16; CAP, 3/29/16.
[10] Brief for the United States as Amicus Curiae Supporting Respondents in Dollar General v. The Mississippi Band of Choctaw Indians, 10/22/15.
[11] Scotusblog, 6/25/16.
[12] Scotusblog, 6/25/16;The Atlantic, 12/7/15
[13] Vox, 6/23/16; Scotusblog, 6/25/16; The Atlantic, 12/7/15; Petition for Certiorari in Dollar General v. The Mississippi Band of Choctaw Indians, 6/12/14.
[14] Scotusblog, 6/25/16.
[15] New York Times, 5/22/12.
[16] New York Times, 5/22/12.

by non-Native men".[17] These rates of sexualized violence rival those in places like Sudan and the Democratic Republic of Congo, where "12% of women say they've been raped in their lifetime."[18] To make matters worse, the Justice Department is only able to prosecute a small percentage of rape cases on Indian reservations. In 2011, for example, the Justice Department prosecuted only 35 percent of such cases.[19]

For the time being, the *Dollar General v. Mississippi Band of Choctaw Indians* case will "stop non-native members from exploiting native members, particularly in cases of sexual abuse, by questioning tribal court jurisdiction" in the states covered by the Fifth Circuit (Texas, Louisiana, and Mississippi).[20] However, without a binding ruling the matter remains clouded for the foreseeable future.

5. Uncertainty about Mounting a Legal Challenge Against Inaccurate Information Published By a Credit Reporting Company

The Issue: Must an individual show an actual injury in order to have legal standing to challenge the publication of inaccurate information by a credit reporting company?[21]

The Background: In order for an individual to bring a case in federal court, he or she must establish standing (the legal right to sue) by demonstrating an injury in fact, fairly traceable to the challenged conduct, and likely to be redressed by a favorable judicial decision.[22] The Fair Credit Reporting Act (FCRA) requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. It also gives aggrieved individuals the ability to sue in federal court.[23]

Spokeo, Inc. v. Robins concerns Spokeo, Inc., a consumer reporting agency that operates a "people search engine". The plaintiff, Thomas Robins, sued Spokeo for gathering and disseminating information about him that was inaccurate, which Robins argued harmed his future chances of employment by misrepresenting his credentials and family status. Spokeo argued that Robins, and a class of similarly situated plaintiffs, lacked standing to bring their case because they had not made "a clear showing that the website's mistakes truly injured them."[24] Robins argued that the FCRA "gives consumers a cause of action to sue in federal court when companies negligently violate the law, as Spokeo allegedly did" and that a violation of FCRA with respect to a consumer's information is sufficient injury in itself.[25] A lower federal court dismissed Robins' complaint, but the Ninth Circuit Court of Appeals reversed finding that "Robins had adequately alleged an injury in fact."[26]

Impact of a Shorthanded Court: *Spokeo, Inc. v. Robins* raises an important and far-reaching question about whether a federal statute that gives an individual the right to sue in federal court when the statute is violated independently creates "standing" for the individual to

[17] New York Times, 5/22/12; The Guardian, 9/8/12; Vox, 6/23/16; The Atlantic, 12/7/15.
[18] The Guardian, 9/8/12.
[19] New York Times, 5/22/12.
[20] Vox, 6/23/16.
[21] Spokeo, Inc. v. Robins, 5/16/16.
[22] Spokeo, Inc. v. Robins, 5/16/16.
[23] Federal Trade Commission, accessed 6/29/16.
[24] Scotusblog, 5/16/16.
[25] Scotusblog, 5/16/16.
[26] Spokeo, Inc. v. Robins, 5/16/16.

sue, or whether that individual must also show "injury-in-fact" arising from the statutory violation. The Supreme Court failed to reach a final decision on this key issue. Instead, in a narrow 6-2 decision that punted on the key issue in the case, the Court vacated the Ninth Circuit's decision and returned the matter to the Ninth Circuit to reconsider its factual analysis of Robins' injury. Specifically, the Supreme Court said that the Ninth Circuit's analysis was incomplete, because although "the injury-in-fact requirement requires a plaintiff to allege an injury that is both "concrete and particularized … [t]he Ninth Circuit's analysis focused on the second characteristic (particularity) [and] overlooked the first (concreteness)."[27] The Court sent the matter back to the Ninth Circuit Court of Appeals to "consider both aspects of the injury-in-fact requirement."[28]

Without deciding the key issue in this case, individuals whose personal details are misreported by a credit reporting company will remain uncertain about whether they are able to use the FCRA alone to seek a remedy. More generally, the central question of whether a federal statute can establish jurisdiction for a court to hear cases involving violations of that statute, is left unresolved. The Court's failure to address this issue leaves unanswered questions for consumers like Robins and online businesses like Spokeo, but it also leaves unanswered significant questions about the enforcement of federal laws in court.

6. A Deadlock Creating Uncertainty about Whether a Resident of One State Can Sue a Second State Without that Second State's Permission

The Issue: Should the Supreme Court overrule its previous decision allowing the resident of one state to sue a second state without that state's permission, if the first state's laws would allow him to do so, but the second state's laws would not?

The Background: The Supreme Court has previously decided that the Constitution permits one state's courts to assert jurisdiction over a second state even if it lacks the second state's consent.

Franchise Tax Board of California v. Hyatt concerns Gilbert Hyatt a former California resident that, in the early 1990s, relocated from California to Nevada.[29] Hyatt says that he moved to Nevada in 1991, but the California Franchise Tax Board says that Hyatt moved to Nevada in 1992. As a result of this discrepancy, the California Franchise Tax Board claims that Hyatt owes "California more than $10 million in taxes, associated penalties, and interest."[30] Subsequently, Hyatt filed suit "in Nevada state court against California's Franchise Tax Board" seeking damages "for what he considered the board's abusive audit and investigation practices, including rifling through his private mail, combing through his garbage, and examining private activities at his place of worship."[31] Although California understood that a prior Supreme Court decision permitted "Nevada's courts to assert jurisdiction over California despite California's lack of consent, California nonetheless asked the Nevada courts to dismiss the case [because] California law … provided state agencies with immunity from lawsuits based upon actions taken during the course of collecting taxes."[32] The Nevada Supreme Court rejected California's claim

[27] Spokeo, Inc. v. Robins, 5/16/16.
[28] Spokeo, Inc. v. Robins, 5/16/16.
[29] Franchise Tax Board of California v. Hyatt, 4/19/16.
[30] Franchise Tax Board of California v. Hyatt, 4/19/16.
[31] Franchise Tax Board of California v. Hyatt, 4/19/16.
[32] Franchise Tax Board of California v. Hyatt, 4/19/16; KPMG, 6/28/16.

finding that "Nevada's courts, as a matter of comity, would immunize California where Nevada law would similarly immunize its own agencies and officials … but they would not immunize California where Nevada law permitted actions against Nevada agencies, say, for acts taken in bad faith or for intentional torts." After granting certiorari once before in this case, the Supreme Court affirmed the Nevada Supreme Court's decision.

Impact of a Shorthanded Court: The Supreme Court took the *Franchise Tax Board of California v. Hyatt* case again to decide, among other things, whether it should overrule its previous decision allowing a resident in one state to sue a second state even if that second state has not consented. On this question, the Supreme Court deadlocked 4 to 4. Therefore, the Nevada Supreme Court's decision -- allowing Hyatt's suit against the Franchise Tax Board of California to go forward -- stands. However, no precedent has been set, and the Court's failure to reach a final decision in this matter leaves open the possibility that the Court could reconsider this again issue in the near future.

7. A Deadlock on Borrowers' Obligations

The Issue: Can borrowers be required to have their spouses guarantee their loans?

The Background: On March 22, the Supreme Court deadlocked 4-4 on the question of whether two women could be required to guarantee loans given to their husbands.[33] Valerie Hawkins and Janice Patterson argued that the bank's demand for payment was discriminatory under the Equal Credit Opportunity Act (ECOA), which has long been understood to prohibit banks from requiring individuals to guarantee their spouses' loans when they have no connection to the loan other than their marriage and an applicant is otherwise creditworthy.

Impact of a Shorthanded Court: The Supreme Court's 4-4 split in *Hawkins & Patterson v. Community Bank* means that small business borrowers across the country now face unsettled law on whether banks can require their spouses to guarantee their loans. Banks in some parts of the country may now require borrowers to seek their spouse's guarantee; business owners in some parts of the country may now need their spouse's agreement to serve as a guarantor before they can seek a loan; and spouses in some parts of the country may now have their personal financial security forcibly tied up in the success or failure of their spouse's loan.

The law of the Eighth Circuit, where the *Hawkins* case arose, is inconsistent with law in the Seventh Circuit, creating different rules in different parts of the country and uncertainty for borrowers who may not know which law applies to them.

The *Hawkins* case illustrates that a deadlocked Supreme Court matters. It undermines certainty and uniformity in our nation's laws.

Conclusion

During this term, the Supreme Court confronted these critical issues and they were unable to render a decision because of a short-staffed court. Without a full complement of nine Justices,

[33] Hawkins & Patterson v. Community Bank, No. 14-520, 3/22/16.

the Court is creating greater uncertainty for Americans as they seek justice at the highest court in the land.

It is time for the U.S. Senate to do its job and consider the nomination of Chief Judge Merrick Garland to the United States Supreme Court. Deliberately blocking any nomination to the Court until next year will undermine the Court's essential role as the nation's final arbiter of law as the new Court term begins in October. Congressional gridlock as a result of Republican obstruction is weakening the Judicial Branch of government and threatening our system of checks and balances. To prevent continued uncertainty on the Supreme Court, Senate Republicans should give Judge Garland a fair and full hearing and vote without further delay.